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No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Montana

BRIEF OF RESPONDENT

ANN C. GERMAN
Counsel of Record
P. O. Box 1530
Libby, MT 59923
(406) 293-4191

AMY N. GUTH
Public Defender
418 Mineral Avenue
Libby, MT 59923
(406) 293-9191

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth Amendment to the Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

This case also involves the Due Process Clause of the Fourteenth Amendment, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves Article VII, section 1 of the Constitution of the State of Montana, which provides:

> The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

This case also involves the Montana statutes set forth in the Brief for Petitioner (at pages 1-3), and § 45-2-103 M.C.A. (1991), which provides in relevant part:

> (1) "[A] person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, a person acts

while having one of the mental states of knowingly, negligently, or purposely.

. . . .

(4) If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements of the offense, the prescribed mental state applies to each element.

STATEMENT OF THE CASE

A. The Proceedings at Trial

Respondent James Allen Egelhoff was charged by Information filed in the Nineteenth District Court, in Lincoln County, Montana, with two counts of deliberate homicide in violation of § 45-5-102, M.C.A. (1991). The Information alleged specifically that he "purposely or knowingly caused the death" of John Christenson[1] and Roberta Pavola. J.A. 10-12.

In an affidavit supporting a Motion to File the Information, the Lincoln County Attorney reported that "Pavola, Christenson, and Defendant were seen drinking together in Troy on July 12, 1992. They were drinking at the Yaak Apartments in Troy." J.A. 8. The affidavit also said that a witness had observed the vehicle in which Christenson, Pavola and Egelhoff were found, and that

[1] Due to an error in the trial transcript, Mr. Christenson has been referred to as "Christianson" in the opinion below and in the Briefs of Petitioner and its *amici curiae*.

she "suspected that the driver of the vehicle was intoxicated." J.A. 3.

Respondent Egelhoff entered a plea of "not guilty" to both counts of the Information. Through counsel, he gave pre-trial notice that the general nature of his defense was:

> 1. General denial and/or
>
> 2. The Defendant did not have the particular state of mind which is an essential element of this offense due to his level of intoxication.

(Nineteenth District Court Record, Doc. No. 129, page 7, filed March 8, 1993).

The prosecution's evidence at trial showed that Mr. Egelhoff was found "semi-conscious" in the back cargo area of a station wagon, along with the bodies of the two victims; he was lying on his right side, with his head towards the back of the cargo area. Tr. 73, 424. Approximately one hour after his apprehension, Mr. Egelhoff's blood was taken at the hospital and tested. By expert testimony and stipulation, the prosecution informed the jury that Mr. Egelhoff's blood alcohol level had proved to be between 33 and 36 grams of alcohol per one hundred milliliters of blood. Tr. 221, 848-849. This is over three times the legal limit for operation of a motor vehicle in Montana. See § 61-8-406, § 61-8-407 M.C.A. (1991). The state's forensic pathologist, Dr. Gary Dale, testified that a blood alcohol level in excess of .10 is routinely described as "acute alcohol intoxication." Tr. 215-216.

At the conclusion of the state's case in chief, Mr. Egelhoff moved to dismiss on the ground that the state

had not proved the mental states required by the statutory terms "purposely" or "knowingly," which are elements of the offense of deliberate homicide; the motion was denied.[2]

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[2] MISS GERMAN: Yes, Judge. We move to dismiss on the ground that the state has failed to prove that the defendant purposely or knowingly caused the death of the two persons, Roberta Pavola and/or John Christianson [sic].

And specifically we would base our motion on the fact that there is no evidence of the mental state required to be proved in a deliberate homicide which requires the proof of purposeful or knowing behavior.

And the state has introduced evidence that Mr. Egelhoff was suffering from .33 blood alcohol shortly after the incident. And it is our contention in light of that fact he could not have been acting either purposefully or knowingly.

I would like to make a record that, although I realize the statute 45, I think 2-203 states that volunteer [sic] intoxication cannot be considered when judging mental state.

There is neither proof in this case that intoxication was voluntary nor do we believe that that is a constitutional statute because it essentially eliminates not [sic] only in the case of intoxication, the requirement that the state prove the mental state otherwise required in the proof of deliberate homicide.

All other reasons why a person wouldn't have a mental state or [sic] the state still has the burden to come forward and prove the purposeful and knowing knowledge.

And that would be [sic] the statute exempt from the requirement of proof of state of mind case where a defendant is intoxicated.

So we believe that that is a discriminatory application of that particular crierior. [sic]

THE COURT: That motion is denied. Any others?

Tr. 954-956.

The defense case included additional evidence of Mr. Egelhoff's intoxication. A defense witness testified that Mr. Egelhoff appeared "inebriated" approximately two and one half hours before his apprehension. Tr. 997-1003. Mr. Egelhoff himself testified that he was unable to remember the events of the evening, due to an alcohol induced "blackout."[3] His testimony on this point was supported by the hospital's treating physician, Dr. Clyde Knecht, who testified that he diagnosed Mr. Egelhoff as suffering from alcohol intoxication, and that his amnesia of the events of the night in question may well have been alcohol induced. Tr. at 1041-1044.

At the conclusion of the trial, the prosecution offered an instruction to the jury, taken from § 45-2-203, M.C.A. (1991), which provides that voluntary intoxication is not a defense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense. Tr. at 1158-1159. Defense counsel objected to the instruction on the grounds, *inter alia*, "that the instruction had the effect of shifting the burden from the state to the defendant with respect to the *mens rea* required by selecting out cases where there is a person that is intoxicated and lowering the mental state in those cases compared to other cases." J.A. 38.

The objection was overruled and the instruction was given orally and in writing. It read as follows:

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[3] Although other witnesses testifed that, at the time of his discovery, he told ambulance attendants of another person, stating "did you find him?," Mr. Egelhoff testified he could not recall saying that and did not know to what he had been referring. Tr. 547, 548, 1128-1130.

INSTRUCTION NO. 11

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

The court's instructions went on, however, to tell the jury that the "elements" that had to be proved beyond a reasonable doubt included "[t]hat the defendant acted purposely or knowingly." Instruction Nos. 13 and 14, Pet. App. 30a. Those terms, in turn, were defined in terms of their statutory definition:

> A person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result.

Instruction No. 9, Pet. App. 28a.

> A person acts knowingly when he is aware of his conduct or when he is aware under the circumstances his conduct constitutes a crime; or when he is aware that there exists the high probability that his conduct will cause a specific result.

Instruction No. 10, Pet. App. 29a. The jury found Mr. Egelhoff guilty of both charges of deliberate homicide.

Mr. Egelhoff moved for a new trial on the grounds, *inter alia*, that the intoxication instruction mandated that the jury disregard evidence of intoxication for any purpose, and that the instruction and the predicate statute,

§ 45-2-203, M.C.A. (1991), were unconstitutional. J.A. 18. The motion was denied and judgment was entered. Mr. Egelhoff was sentenced to forty-two years in prison on each count, with the terms to be served consecutively.[4]

B. The Decision of the Montana Supreme Court

Mr. Egelhoff appealed his conviction to the Montana Supreme Court, arguing among other things that his right to due process was denied when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

The Montana Supreme Court requested oral argument and supplemental briefing on that issue. Following the supplemental briefing, the Montana Supreme Court unanimously held that "Egelhoff was denied due process when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense." Pet. App. 16a. The Montana Supreme Court based its holding on the constitutional principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979), requiring a jury finding that every element of a criminal offense has been proved beyond a reasonable doubt, and *Chambers v. Mississippi*, 410 U.S. 284 (1973), guaranteeing criminal

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[4] At the sentencing hearing, the trial judge commented, "We don't know anything about what caused you to do this on the basis of what you have given to us." J.A. 36

defendants the "right to present a defense. . . . " Pet. App. 10a-13a.[5]

The Montana Supreme Court's majority opinion specifically limited its finding to a portion of the statute (and the instruction).

> We conclude that the defendant had a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged. We conclude that the following portion of § 45-2-203, M.C.A. (1991), is a violation of due process and is therefore unconstitutional:
>
> "[an intoxicated condition] . . . may not be taken into consideration in determining the existence of a mental state which is an element of the offense . . . "

Pet. App. 16a. The court reversed Egelhoff's conviction and remanded for a new trial. Pet. App. 19a.

In a special concurrence, Justice Nelson, joined by Justice Gray, emphasized the narrow scope of the Court's decision. Justice Nelson cautioned that the decision not be:

> . . . misread as allowing an affirmative defense of voluntary intoxication in criminal cases. That is absolutely not so. This case is not about a defense. Rather, it deals with burden of proof and the fundamental obligation of the State to

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[5] The Montana Court did not reach the broader contention made by Mr. Egelhoff, that a criminal conviction without proof of criminal intent was "inconsistent with our philosophy of criminal law." See Pet. App. 11a, citing *Morissette v. United States*, 342 U.S. 246 (1951).

> prove each element of a criminal charge – including the mental state element – beyond a reasonable doubt.
>
> As a general proposition, the legislature may enact statutes that specify what defenses are and are not available to a charge of criminal conduct. In Montana, the legislature has, permissibly, determined that voluntary intoxication is not a defense to the commission of a crime and that, while voluntarily intoxicated, a person is still criminally responsible for his or her conduct. . . . [T]he portion of § 45-2-203, M.C.A., which provides that "an intoxicated condition is not a defense to any offense" was and is constitutional. That portion of the statute is not at issue in this case. On the other hand, as pointed out in our opinion, it is always the obligation of the State to prove beyond a reasonable doubt each and every element of the crime charged, including that the defendant acted with the requisite mental state. If, in a given case, the only way that the prosecution can prove the defendant's mental state is by *prohibiting* the jury from considering the fact that the defendant was too intoxicated to form the requisite mental state, then the State effectively and impermissibly has been relieved of all or part of its burden to prove beyond a reasonable doubt an essential element of the crime charged.

Pet. App. 19a-20a (original emphasis).[6]

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[6] Justices Nelson and Gray said they found the intoxication instruction unconstitutional "[u]nder both the Montana and federal constitution . . . " Pet. App. 20a. In a separate concurrence, Justices Trieweiler and Hunt similarly said that they found the result reached by the majority opinion to be

In another special concurrence, Chief Justice Turnage suggested that the legislature reinstate the provisions of the statute that existed prior to 1987: "[A]n intoxicated or drugged condition may be taken into consideration in determination of the existence of a mental state which is an element of the offense." Pet. App. 22a. Instead, the State filed this petition for certiorari.

SUMMARY OF ARGUMENT

The Montana Supreme Court's decision below rested on two state law premises that dictated its federal constitutional conclusion.

The first of these premises involves the *mens rea* elements of the offense of deliberate homicide in Montana. Contrary to the arguments being made in this Court, and consistent with the language of the Montana statutes, the Montana Supreme Court held that those elements are "knowingly" or "purposely" causing the death of another human being. § 45-5-102, M.C.A. The Montana Court's decision – which is conclusive on this point – made it clear that these elements have not been "redefined" by the intoxication statute that gave rise to the jury instruction at issue here, and they remain "subjective mental state element[s] required for conviction of a crime" in Montana. Pet. App. 15a.

Even if it were reviewable, that conclusion is fully consistent with the language of the Montana statute at

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dictated equally by "the constitution of this state, or of the United States. . . ." Pet. App. 26a.

issue here. That statute does not purport to change the definition of any statutory element, but states directly that intoxication evidence "may not be taken into consideration in determining the existence of a mental state which is an element of the offense." § 45-2-203, M.C.A. (1991).

The second state law premise of the Montana Supreme Court's decision was that the intoxication evidence admitted in this case "was relevant to the issue of whether Egelhoff acted knowingly and purposely." Pet. App. 11a. This reflected the Montana Court's interpretation of its deliberate homicide statute as requiring proof of the "subjective mental state" of the accused, and its factual determination that intoxication may alter cognition in a way which makes the existence of such mental states less likely than it would be for a nonintoxicated person in the same circumstances.

The Montana Supreme Court's conclusion that this statutory instruction violates the federal constitution followed inexorably from these premises. This Court reached a similar conclusion when it examined a similar instruction which circumvented the proof requirements of this same Montana statute in *Sandstrom v. Montana*, 442 U.S. 510 (1979). The court reiterated the constitutional principle on which *Sandstrom* was based, with reference to a hypothetical jury instruction indistinguishable from the one given here, in *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987). This Court has steadfastly adhered to this principle and to the bedrock constitutional requirement that an adjudication of guilt of a criminal offense may follow only from the determination of a jury that all elements of

a statutory offense have been proved beyond a reasonable doubt. The Montana Supreme Court correctly applied that principle here.

The Montana Supreme Court's decision also rested on a second line of authority from this Court, involving an equally basic due process right: "the right to a fair opportunity to defend against the State's accusations." Pet. App. 12a. The accusation against Mr. Egelhoff was that he knew that his actions would cause the death of another, and intended that they do so. The Montana Supreme Court correctly found that it would be fundamentally unfair to permit the State to offer evidence in support of such an accusation, without permitting the jury to consider the evidence that cast doubt upon it.

The evidence of Mr. Egelhoff's intoxication was highly reliable and directly relevant to the accusation against him. The evidence was initially offered by the prosecution as part of its case, in an attempt to support its theory of how and why Mr. Egelhoff would have committed this crime. Although the jury heard this evidence, the trial court's instructions forbade it to consider the extreme level of intoxication insofar as that evidence raised a doubt about Mr. Egelhoff's guilt. That instruction was based on a statutory rule that is categorical, and excludes all judicial discretion to determine the relevance of such evidence in a given case. It denied Mr. Egelhoff the fundamental "opportunity to be heard" guaranteed by due process, in the most literal sense: the jury was required to close its ears to his arguments regarding the implications of the evidence already before it. This Court has never countenanced such a restriction on basic due

process rights; the Montana Supreme Court was correct in refusing to do so.

Contrary to the forebodings of Petitioner's *amici*, the decision below in no way impairs the State's legitimate ability to prevent and punish crimes committed by intoxicated persons. Montana law already provides severe penalties for negligent homicide, which includes unintentional killings by intoxicated persons. If it wished to do so, Montana could enact even more severe laws, directly punishing deaths caused as a result of voluntary intoxication, without regard to any additional element of intent or knowledge. But what the State cannot do is define a crime in terms of a subjective mental state, but then direct juries to convict defendants of those offenses without regard to whether those elements have actually been proved.

The Montana Supreme Court's decision so holding worked no radical change in the criminal law or the scope of the Due Process Clause. Similar principles have been recognized nationwide for over one hundred years, since this Court's decision in *Hopt v. People*, 104 U.S. 631 (1881). The vast majority of states' statutes and caselaw recognize and embody the principle applied below – as did the law of Montana, throughout its history, until the amendment of the statute in issue here in 1987.

The Montana Supreme Court's decision merely required the Montana Legislature to stay within well-established constitutional bounds in addressing this problem. Its decision was correct and should be affirmed.

ARGUMENT

I. THE MONTANA SUPREME COURT CORRECTLY HELD THAT IN CRIMINAL PROSECUTIONS, THE FEDERAL CONSTITUTION DOES NOT PERMIT COURTS TO INSTRUCT JURIES TO DISREGARD RELEVANT EVIDENCE IN DETERMINING WHETHER THE ELEMENTS OF A CHARGED OFFENSE HAVE BEEN PROVED.

The unanimous decision of the Montana Supreme Court below was a straightforward application of settled principles of federal constitutional law to an unusual state statute. The Montana Court's conclusion that a jury instruction based on that statute was unconstitutional flowed inexorably from its authoritative (and quite reasonable) interpretation of the Montana homicide law under which Mr. Egelhoff was prosecuted.

In their effort to overturn that conclusion, Petitioner and its *amici* distort what the Montana Supreme Court actually held, and disregard its authoritative reading of Montana law. Because the state law premises of the decision below were crucial, we begin by reviewing those premises. We then turn to the federal constitutional conclusions that follow from them.

A. The Montana Supreme Court's Decision Rested On Interpretations of Montana Law, On Which It Is the Final Authority.

The challenge to the decision below made by Petitioner and its *amici* is based in large part on arguments against the Montana Supreme Court's interpretation of Montana law in this case. Petitioner suggests, and its

amici say directly, that there is no constitutional problem here because the statute at issue merely redefined the elements of deliberate homicide in Montana. In a related vein, they claim that the evidence of Mr. Egelhoff's intoxication was properly excludable because it was not relevant to the *mens rea* elements of deliberate homicide, or was somehow prejudicial to a fair determination of whether those elements were proved.

Neither of these arguments can bear a moment's scrutiny. They are inconsistent with the language of the Montana statutes, with the jury instructions in this case, and with common sense. More importantly, they are matters of Montana state law on which the Montana Supreme Court is the final authority, and the Montana Supreme Court's decision below squarely rejected them both.

1. The Montana Supreme Court Held the Statute at Issue Here Did Not Change the Elements of Deliberate Homicide.

The source of the constitutional problem found by the court below was that Mr. Egelhoff's "jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense." Pet. App. 16a.

The mental elements of the crime of deliberate homicide in Montana are knowingly causing death, or purposely causing death. § 45-5-102, M.C.A. (1991). The Information by which Mr. Egelhoff was charged alleged accordingly that he "purposely or knowingly caused the death" of John Christenson and Roberta Pavola. J.A.

10-12. Mr. Egelhoff's jury was instructed that, to convict him of deliberate homicide, it had to find that he caused the death of a human being, and that he acted purposely or knowingly. Instructions Nos. 13 and 14, Pet. App. 30a.

Montana law defines "purposely" and "knowingly" in subjective terms. "A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's *conscious object* to engage in that conduct or to cause that result." § 45-2-101(63), M.C.A. (1991) (emphasis added). "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person *is aware* of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person *is aware* that it is highly probable that the result will be caused by the person's conduct." § 45-2-101(34), M.C.A. 1991 (emphasis added). The jury in this case was instructed accordingly:

> A person acts purposely when *it is his conscious object* to engage in conduct of that nature or to cause such a result.

Instruction No. 9, Pet. App. 28a (emphasis added).

> A person acts knowingly when *he is aware* of his conduct or when *he is aware* under the circumstances his conduct constitutes a crime; or, when *he is aware* there exists the high probability that his conduct will cause a specific result.

Instruction No. 10, Pet. App. 29a (emphasis added). Because deliberate homicide is defined in terms of "result" – "caus[ing] death" – these definitions required

proof that Mr. Egelhoff was aware his conduct would likely cause death, or had a conscious purpose to do so.

Contrary to the arguments of Petitioner's *amici*[7] the intoxication instruction at issue here, and the statute on which it was based, did not purport to change the elements of deliberate homicide – or of any other offense defined by Montana law, to which the statute applies globally.[8] To the contrary, what the statute and the instructions say is that intoxication "may not be taken into consideration in determining the existence of *a mental state which is an element of the offense*" unless the defendant proves the intoxication was unknowing.[9] § 45-2-203, M.C.A. (1991) (emphasis added).

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[7] The Petitioner never clearly adopts the extreme position of its *amici*: that, regardless of what the Supreme Court of Montana says, the intoxication statute has redefined the elements of deliberate homicide under Montana law. Compare Brief for Petitioner at 35 with Brief of the United States at 24-25; Brief of the Criminal Justice Legal Foundation (CJLF) at 2, 6. Brief of AARR at 6. Ironically, these *amici* take this position, claiming an understanding of Montana law superior to the state court that is its final expositor, in the name of the state's rights. See *id.* at 11; Brief of Hawaii, et al. at 9. "It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. 222, 235 (1992).

[8] The "redefinition" argument of Petitioner's *amici* overlooks completely the fact that this statute applies to all criminal offenses in Montana, from possession of stolen property to deliberate homicide. See, e.g., Brief of CJLF at 5-6. Similarly overlooked by this argument is the fact this statute applies to all types of *mens rea* elements in Montana, which does not distinguish in its state law between "specific" and "general" intents. See, e.g., Brief of the United States at 21.

[9] This exception to the statutory rule for involuntary intoxication, though not at issue here, further belies any

The Montana Supreme Court therefore was clearly correct in concluding that the elements of the offense of deliberate homicide were not changed by the intoxication statute. Pet. App. 11a. That Court, not the Petitioner or its *amici*, "is the final authority on the meaning of [Montana] law." *Stringer v. Black*, 503 U.S. at 234 (1992). Even if the construction given the Montana statutes by Petitioner and its *amici* were reasonable – and we submit they are not – "the highest court of the State has concluded otherwise and it is not [this Court's] . . . function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); see *Bell v. Maryland*, 378 U.S. 226, 237 (1964).

The basic premise of the Montana Supreme Court's decision – that the elements of deliberate homicide remain the actual awareness that one's acts will cause death, or an actual purpose to cause death – must be accepted as a given. Under Montana law, and under the instructions it was given, Mr. Egelhoff's jury had to find what his purpose was, what he "[was] aware" would likely result from his actions, not what some hypothetical sober person would have known or intended in similar circumstances.

That was the context in which the Montana Supreme Court reviewed the instruction requiring the jury to

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argument that this statute redefined Montana law to include some kind of new, hybrid mental element like "knowingly-or-purposeful-if-not-intoxicated." No one has suggested any rational reason to believe the effect of drugs or alcohol on cognition and awareness differ depending on the circumstances of their ingestion.

ignore evidence of Mr. Egelhoff's extreme level of intoxication. That context cannot be altered now by the revisionist arguments of Petitioner and its *amici*.

2. The Montana Supreme Court Held That The Evidence of Respondent's Intoxication Was Relevant to the Truth of the State Law Charges Against Him.

The opinion of the Montana Supreme Court also included the following ruling of state law that is basic to the issue presented here, but is ignored by Petitioner and its *amici*:

> The evidence presented at trial established that Egelhoff had a level of intoxication measured at .36. It is clear that *such evidence was relevant* to the issue of whether Egelhoff acted knowingly and purposely;. . . .

Pet. App. 11a (emphasis added). In Montana, as in most states, evidence is considered "relevant" if it makes a fact more or less probable than it otherwise would be. Mont. R. Ev. 401. The Montana Supreme Court's holding, therefore, means that Mr. Egelhoff's intoxication made it less probable that he had the knowledge or purpose that is essential to a conviction of deliberate homicide in Montana.

That conclusion is fully supported by the scientific and medical literature on the effects of intoxication on perception and cognition,[10] and the longstanding and

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[10] "Alcohol acts as a depressant and, in large amounts, can seriously interfere with the drinker's perceptive capacity and mental powers. With 0.30 percent or more of alcohol in the

nearly universal conclusions of courts in other jurisdictions. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1049-1050 (1944); Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1683-1687 (1981).

Moreover, at bottom that conclusion rests on a construction of Montana homicide law and the nature of the *mens rea* elements it contains. As the Solicitor General's Brief points out, relevance is not "an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in a case." *Huddleston v. United States*, 485 U.S. 681, 689 (1988); see, Brief of U.S. at 25. The "matter properly provable" in a homicide case in Montana is a matter of state law. Whatever courts or commentators elsewhere think about alcohol and its effects in the context of other state laws, the Montana Supreme Court is the final authority on that subject with regard to prosecutions under its state statutes. *Stringer v. Black*, 503 U.S. at 234-235. Its determination that alcohol intoxication can impair a person's "knowledge" or "purpose," even as he remains capable of violent action, is not subject to reevaluation or challenge by Petitioner or its *amici*. That determination is the second basic state law premise on which

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blood (the equivalent of a pint of whiskey in the body), a drinker's sensory perceptions are quite dulled and he has little comprehension of what he sees, hears or feels." Greenberg, *Intoxication and Alcoholism: Physiological Factors*, 315 Annals 22, 27 (1958) quoted in Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 Ford. L. Rev. 221, 227 n.33 (1984); see also, Paulsen, *Intoxication as a Defense to Crime*, 1961 U.Ill.L.F. 1, 4 n.27.

the Montana Supreme Court's decision was based, and from which it inevitably followed.

B. The Montana Supreme Court Correctly Found this Statute Denies Criminal Defendants the Most Basic Rights Guaranteed by the Federal Constitution.

The Montana Supreme Court's interpretation of its statutes framed the constitutional issue before it in stark relief: Mr. Egelhoff's jury had been required to decide whether the mental elements of the offense with which he was charged were proved – whether he was "aware" of his actions and their consequences – while disregarding the evidence before it that bore most directly on that issue, the only evidence on that issue that could conceivably support the defense. It found such a restriction on the role of the jury and the rights of a defendant in a criminal case to be unacceptable under several lines of constitutional authority. On each of those points, the Montana Court's decision was correct and consistent with an unbroken line of due process decisions from this Court.

1. The Right to a Jury Finding That All Elements of an Offense Are Proved Beyond a Reasonable Doubt.

The principal line of authority followed by the Montana Supreme Court prominently includes another case involving the very same Montana homicide law under which Mr. Egelhoff was charged: *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The constitutional issue in *Sandstrom* arose from circumstances strikingly similar to those here. David Sandstrom was charged with deliberate homicide, which then as now required proof that he had acted "knowingly" or "purposely." *Id.* at 512, n.1. The statutory definitions of those mental elements were exactly the same then as they are now: they require proof that the defendant was "aware" of his actions and their likely consequences. *Id.* at 525, n.12. However, Mr. Sandstrom's jury was instructed – pursuant to a Montana statute that was separate from the sections defining the crime of deliberate homicide and its elements[11] – that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513.

This Court's decision in *Sandstrom* unanimously held that instruction violated the federal constitution by relieving the state of its burden of proving all elements of a charged offense beyond a reasonable doubt. *Id.* at 523. In so holding, it quoted from *In re Winship*, 397 U.S. 358, 364 (1970), as follows:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charged."

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[11] See *Sandstrom v. Montana*, 442 U.S. at 518 n.6 [citing § 26-1-502, M.C.A. (1978), which defined "disputable presumptions" to include "that a person intends the ordinary consequences of his voluntary act."]

442 U.S. at 520 (emphasis supplied by the Court in *Sandstrom*). The *Sandstrom* decision found the instruction given to the jury in that case to " 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and . . . 'invade [the] fact-finding function' which in a criminal case the law assigns solely to the jury' " because under it "[t]he State was . . . not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged.' " 442 U.S. at 523, quoting *Winship*, 397 U.S. at 364.

The Montana Supreme Court correctly held that this *Winship* principle renders the instruction here unconstitutional. Pet. App. 10a. Indeed, functionally if not formally, the two instructions are virtually identical: both require the jury to find the actual knowledge or purpose that are elements of deliberate homicide in Montana, whether or not they actually exist in the case at hand, if they *would have* existed under other, "normal" circumstances. In *Sandstrom*, the instruction effectively negated psychiatric evidence that explained how the defendant in that case could have engaged in obviously homicidal conduct without knowing he was causing death or intending to do so,[12] by telling the jury intent was "presumed." In this

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[12] Mr. Sandstrom killed an 89-year old woman in a "brutal assault in which she received blows to her head from a shovel, and given stab wounds to her back from a kitchen knife," and was "sexually assaulted and received a compound fracture to her leg, apparently after the slaying." *State v. Sandstrom*, 580 P.2d 106, 107 (Mont. 1979). The defense at his trial presented psychiatric testimony that he intended only to " 'silence' " the victim. 580 P.2d at 108. On remand in *Sandstrom*, the Montana

case, the instruction was more focused, directed at the very kind of evidence before Mr. Egelhoff's jury that could have given rise to a doubt about whether he acted with the knowledge he was causing death or the intent to do so. The effect would have been much the same if Mr. Egelhoff's jury had been told "[t]he law presumes that a person intends the ordinary consequences of an act committed while he is voluntarily intoxicated." Indeed, in some respects the impact of such an instruction would have been less devastating to Mr. Egelhoff's rights than what occurred here. Under a *Sandstrom* type instruction, the defendant at least has the ability to rebut the statutory presumption; but under the instruction given here the jury must find intent regardless of any evidence of intoxication, however conclusive.

"Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam). As Justice Scalia explained in his concurring opinion in *Carella*, several central and interlocking constitutional values are implicated by such instructional devices:

> The Court has disapproved the use of mandatory conclusive presumptions not merely

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Supreme Court found that such testimony could make circumstantial evidence of knowledge or purpose inconclusive, so the constitutional error in that case was not harmless. *State v. Sandstrom*, 603 P.2d 244 (Mont. 1979). The Montana Court found much the same thing in its decision below (Pet. App. 16a); and the Petitioner has not argued here that the instruction was harmless on the facts of this case.

> because it "conflict[s] with the overriding presumption of innocence with which the law endows the accused," *Sandstrom v. Montana*, 442 U.S. 510, 523, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) (quoting *Morissette v. United States*, 342 U.S. 246, 275, 96 L.Ed. 288, 72 S.Ct. 240 (1952)), but also because it " 'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury," 442 U.S., at 523, 61 L.Ed.2d 39, 99 S.Ct. 2450 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 446, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978)). The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155, 20 L.Ed.2d 491, 88 S.Ct. 1444, 45 Ohio Ops 2d 198 (1968). It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.*, at 156, 20 L.Ed.2d 491, 88 S.Ct. 1444, 45 Ohio Ops 2d 198. A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

491 U.S. at 268. These same principles underlay the decision of the Court in *Sullivan v. Louisiana*, 113 S.Ct. 2078, 124 L.Ed.2d 182, 188 (1993):

> [W]e found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice," and therefore applicable in state proceedings. The right includes, of

> course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." See *Sparf and Hansen v. United States*, 156 U.S. 51, 105-106, 39 L.Ed. 343, 15 S.Ct. 273 (1895). Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. *Ibid.*

See also *United States v. Gaudin*, 115 S.Ct. 2310 (1995). The instruction here effectively directed a verdict for the State, forbidding the jury from acquitting the defendant – even if it had a reasonable doubt as to his guilt, if that doubt arose from evidence of his intoxication.

The Montana Supreme Court was fully justified in holding the constitution would not countenance such an invasion of the jury's factfinding role. Indeed, its conclusion was compelled by this Court's restatement of the *Sandstrom* principle with reference to a virtually identical (albeit hypothetical) jury instruction[13] in *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987). The Montana Supreme Court's opinion quoted from *Martin* at length, as follows:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside

[13] Again, the impact of the instruction in this case was even more severe than the one described in *Martin*: for under this instruction, evidence of voluntary intoxication had to be "put aside for all purposes" however powerful the jury may have found it, even if it proved *conclusively* that the defendant did not have the requisite knowledge or intent.

> for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of *Winship's* mandate. 397 U.S., at 364. The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.
>
> . . .
>
> When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. . . .

Pet. App. 13a. Although this statement in *Martin* may technically have been *dictum* in light of the Court's interpretation of the jury instructions in that case, the constitutional principle it described was nonetheless "plain" and well settled. Its application to the circumstances of this case is difficult even for Petitioner to dispute.

Once the Montana Supreme Court determined that an actual knowledge and purpose to cause death remain the "fact[s] necessary for the finding of guilt" of deliberate homicide, it had no alternative but to invalidate the instruction here. "The applicability of the reasonable doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given

case." *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977).[14] This instruction which told the jury it *must* convict even "if the evidence offered by the defendant raises [a] reasonable doubt about the existence" of those facts, if that evidence involved voluntary intoxication. The Montana Supreme Court did not err in so doing.

Indeed, given its state-law premises, the Montana Supreme Court simply could not have decided differently than it did without flouting *Sandstrom*. The same reasoning which Petitioner suggests and which its *amici* espouse now (that the Montana voluntary-intoxication statute should be deemed to have qualified, mooted, or superseded the mental-state elements of Montana homicide law for purposes of federal Due Process analysis) would have been indistinguishably applicable to the Montana presumptive-intent statute involved in *Sandstrom* and would have required precisely the opposite result than this Court reached in *Sandstrom*. Ironically, such a result might have been defended in *Sandstrom* by reading the Montana Supreme Court's opinions there – affirming Sandstrom's conviction – as equivocal on the state-law question whether one Montana statute implicitly repealed

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[14] Although citations to *Patterson* pervade the arguments of Petitioner and its *amici*, they all missed this central point: in *Patterson*, the New York Court of Appeals held "that the New York statute involved no shifting of the burden to the defendant to disprove any fact essential to the offense charged since the New York affirmative defense of extreme emotional disturbance bears no direct relationship to any element of murder." 432 U.S. at 201. Here, the Montana Supreme Court authoritatively, and quite reasonably, held precisely the opposite. See Part I A 1, above.

another; here, the square holding and express language of the Montana Supreme Court decision reversing Egelhoff's conviction preclude any reading of the sort.

2. The Right to Present a Defense

The decision below also invoked another due process principle which was no less plainly violated by this instruction: "the right to a fair opportunity to defend against the State's accusations." Pet. App. 12a, quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

The right to present a defense is distinct from the right to a jury determination of the fact of guilt at issue in *Sandstrom*, but no less fundamental. As Justice Powell's opinion for the Court in *Chambers* recalled:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in *In re Oliver*, 333 U.S. 257, 273 (1948), identified these rights as among the minimum essentials of a fair trial:
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> > "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

> See also *Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 428-429 (1969); *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

410 U.S. at 294-95.

This Court has never retreated from the *Chambers* principle,[15] but has applied and approved it repeatedly.

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[15] Contrary to the arguments of the United States, nothing truly comparable to the constitutional issue here was involved in *Fisher v. United States*, 328 U.S. 463 (1946). The jury in *Fisher* heard the defendant's psychiatric evidence and was unrestricted in its ability to consider it with reference to the elements of the offense. *Fisher's* appeal focused on the refusal of an affirmative instruction supporting his defense theory of the relevance of that evidence. *Ibid.* This Court's closely divided decision in *Fisher* held that request raised an issue regarding the nature of the law of the District of Columbia, best left to its local courts. *Id.* at 476. Interestingly, those courts later overruled the common law rule at issue in *Fisher*, *U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). See also *U.S. v. Pohlot*, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (Fisher rule rejected under current federal law.)

It is even more compelling that the California Supreme Court later disapprove the implications of its analogous decisions in *People v. Troche*, 206 Cal. 35, 273 P. 767 (1929) and *People v. Coleman*, 20 Cal.2d 399, 126 P.2d 349 (1942), of which the Solicitor General makes so much (Brief of U.S. at 12-14). See *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53 (1946), *cert. denied*, 338 U.S. 836 (1949). The grounds on which the Court in *Wells* did so foreshadowed the development of the Due Process principles applied below:

> A defendant charged with a crime is presumed to be innocent of, and is entitled to appear and defend against, the charge in its entirety, not merely as to some of its elements but as to each and all of those elements. Subject to various limitations a statute may validly declare a prima facie presumption to be the legal result of the proof of certain facts, but the due process clause of the Fourteenth Amendment requires that there be a rational connection between the facts proved and the fact presumed. . . . To make a presumption of a factual element of guilt conclusive at all stages of the trial, or to preclude the defendant absolutely and at all stages from meeting proof of an element of guilt adduced by the prosecution, cannot be sustained.

202 P.2d at 63 (Citations omitted).

> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. . . . That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence.

Crane v. Kentucky, 476 U.S. 683, 690-91 (1985) (citations omitted). "Our cases establish, at a minimum, that criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Although that right has not been viewed as absolute, it has never been made to yield to the kind of categorical exclusion of highly reliable evidence,[16] directly relevant to guilt or

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[16] The state did not argue below, and the trial court did not suggest, that the evidence of Mr. Egelhoff's intoxication was factually unreliable. Nor is there anything to indicate that the Montana legislature shared the historical concern about the reliability of intoxication evidence cited by one of Petitioner's *amici*. Brief of CJLF at 10. Whatever part such concerns may have played in the development of the common law rules, they have no basis in light of modern technology. Like virtually every other state, Montana has found the kind of scientific

innocence, that is at issue here. To the contrary, the Court has said that "[a] State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Rock v. Arkansas*, 483 U.S. 44, 61 (1986).[17]

Nor, in any other of this Court's cases we have found, has that right ever before been infringed upon in the extraordinary manner it was here. The intoxication evidence in this case was not kept out of court, it was admitted and heard by the jury; the jury was simply told to disregard it with reference to the *mens rea* issues it was told to decide. This adds an element of arbitrariness that goes even beyond the unfairness of preventing the defendant from presenting a defense.[18] See *Windsor v. McVeigh*, 93 U.S. 274, 277-78 (1876).

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evidence of intoxication by blood analysis used in this case to be highly reliable and generally admissible into evidence in all types of cases. In fact, such evidence is the statutorily required basis for an entire class of crime in Montana. See §§ 61-8-401, et seq. M.C.A. (1991) (operating motor vehicles under influence of alcohol, etc.)

[17] The *per se* rule at issue here bears no resemblance to the sorts of evidentiary rules cited by the Solicitor General. Brief for the United States at 1-2, 25-26, n.14. Those rules – many of which Montana law shares – require trial judges to make case by case determinations based on the probative value of certain evidence weighed against considerations of unfair prejudice, confusion, and waste of time. Mont. R. Ev. 403; see, generally, Mont. R. Ev. 401-411, 702. None involve the kind of categorical, absolute exclusion of concededly relevant and reliable evidence involved in this case.

[18] The Montana Supreme Court's decision pointed out one way in which a jury might misinterpret the contradictory instructions: " . . . the jury may be misled into believing the State has proved the mental state beyond a reasonable doubt and that

For all these reasons, the Montana Supreme Court was correct in concluding that the prohibition against the consideration of relevant evidence of intoxication violated, in addition to the *Sandstrom* principle, criminal defendants' "due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged." Pet. App. 16a.

II. THE MONTANA SUPREME COURT'S DECISION DOES NOT IMPAIR THE LEGITIMATE POWER OF THE STATES OR FEDERAL GOVERNMENT TO PUNISH CRIMES COMMITTED WHILE INTOXICATED.

Lacking any support for their position in this Court's constitutional case law, Petitioner and its *amici* have deluged the Court with policy arguments about the dangers of crime related to drug and alcohol intoxication, suggesting those are so great that they should prevail over basic constitutional guarantees. Pet. Br. 17-19, Brief of Hawaii, et al. at 14-18; Brief of CJLF at 8-13; Brief of AARR at 1-3. Those arguments are both overstated and irrelevant to the procedural due process issue here.[19]

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is why defendant cannot introduce evidence in opposition to a specific state of mind." Pet. App. 14a.

[19] One of Petitioner's *amici* attempts to legitimize these policy arguments by informing the court that the issue here "should be analyzed under substantive, and not procedural, due process." Brief of CJLF at 2. The only authority cited in support of that remarkable proposition is stunningly irrelevant: it is *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), a civil case in which this Court found no liberty interest was at issue, which is

Nothing in the decision below prevents states from prohibiting and severely punishing intoxication-related criminal behavior. Montana does so in its homicide law, for example: it defines negligent homicide in objective terms, making it sufficient that the defendant "disregard[ed] a risk of which he should be aware" in a "gross deviation from the standard of conduct that a reasonable person would observe." §§ 45-5-104, 45-2-101(31), M.C.A. The penalty for negligent homicide in Montana is up to ten years in prison – with enhancement possible if the defendant is found to be a persistent felony offender, § 46-18-501, M.C.A. or to have used a dangerous weapon, § 46-18-221, M.C.A.

If it found that inadequate, nothing in the decision below prevents the Montana legislature from going further and creating a crime of "causing death while voluntarily intoxicated" – just as it can create an offense of being in public while intoxicated. See *Powell v. Texas*, 392 U.S. 514 (1968). Although it was argued below that such a strict liability offense could violate due process, the Montana Supreme Court pointedly refrained from resting its decision on that substantive due process ground.[20]

In addition, of course, states have enormous power to regulate, or prohibit, alcohol as well as intoxicating drugs, under the Twenty-first Amendment and under

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cited here because a state court had deemed a presumption a "substantive rule of law," *id.* at 119-120 – the exact opposite of what the Montana Supreme Court decided below.

[20] See Pet. App. 11a [noting, but not addressing, Appellant's arguments based on *Morissette v. United States*, 342 U.S. 246 (1951)].

their police powers. See *California v. LaRue*, 409 U.S. 109 (1972) (preeminence of powers granted by Twenty-first Amendment); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (life imprisonment for illegal drug possession).

But the best evidence that the constitutional decision below will not dangerously restrict states' ability to enforce their laws against intoxication-related crimes is the fact that it comports with the longstanding practice of a large majority of the states – including, until recently, Montana. The principle applied below has been recognized by this Court, as a matter of statutory interpretation at least, for well over 100 years. See *Hopt v. People*, 104 U.S. 631 (1881). It is consistent with the present law of the United States and of all[21] but a small number of states. By our count it appears that affirmance of the decision below will call into question only six state statutes applicable to homicide cases and would directly contradict the decisions of only three additional state courts.[22] Surely, if the procedural protections enforced by

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[21] *See e.g., Terry v. State*, 465 N.E.2d 1085 (Ind. 1984), declaring unconstitutional a statute that forbade consideration of intoxication evidence and concluding that a defendant in Indiana can offer a defense of voluntary intoxication to any crime.

[22] Only nine states have statutes or case law now in effect that bar jury consideration of the effect of intoxication on the issue of mental states that are elements of an offense. Of those, three rely on case law to bar consideration of intoxication: *White v. State*, 717 S.W.2d 784 (Ark. 1986); *Lanier v. State*, 533 So.2d 473 (Miss. 1988); *State v. Vaughn*, 232 S.E.2d 328 (S.C. 1977). Five have statutes which have been construed to bar such consideration: *Wyant v. State*, 519 A.2d 649 (Del. 1986) (Del. Code Ann. tit. 11, § 421 (Repl. 1987)); *Foster v. State*, 374 S.E.2d

the decision below posed such a danger to public order, the large majority of state courts and legislatures would not have adopted them, as they have.

CONCLUSION

The decision of the Supreme Court of Montana should be affirmed.

Respectfully submitted,

ANN C. GERMAN
Counsel of Record
P. O. Box 1530
Libby, MT 59923
(406) 293-4191

AMY N. GUTH
Public Defender
418 Mineral Avenue
Libby, MT 59923
(406) 293-9191

Attorneys for Respondent

188, 194-95 (Ga. 1988), *cert. denied*, 490 U.S. 1085 (1989) (Ga. Code Ann. § 16-3-4 (1968)); *State v. Souza*, 813 P.2d 1384 (Haw. 1991) (Haw. Rev. Stat. § 702-230 (1986)); *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S.Ct. 88 (1994) (Mo. Rev. Stat. § 562.076 (1983)); *Hawkins v. State*, 605 S.W.2d 586 (Tex. Crim. App. 1980) (Tex. Penal Code Ann. § 8.04 (Vernon 1974)). Arizona's statute was recently enacted, [(Ariz. Rev. Stat. Ann. § 13-503 (1995)]. Pennsylvania, in contrast, cited by Amicus Br. of Delaware *et al.* at 4 n.1 (filed Nov. 6, 1995) at 4, n.1, *allows* evidence of intoxication to reduce the degree of murder. [18 Pa. Cons. Stat. Ann. tit. 18, § 308 (Purdon 1976)].